Labor Inspection over Unpaid Wages for Temporary Workers

Ⅰ. Introduction

I would like to introduce a recent case regarding claims for unpaid wages against a local council and how it was handled. Since 2016, the local council has been hiring 30 audit assistants for 40 days each year to assist with administrative audits. These assistants worked for KRW 100,000 per day, 5 days a week and 8 hours a day.

An audit assistant sought to claim the weekly holiday allowance and annual paid leave, neither of which had been given, but the local council explained that the assistant would not be regarded as a worker because he was hired for a commissioned position only during the administrative audit period. In response, the audit assistant filed a complaint with the Labor Office on December 9, 2022, stating that the local council owed him unpaid wages. During investigation by the Labor Office on December 28, the local council argued that audit assistants were not workers because they were used for commissioned work only during the administrative audit period in accordance with local ordinances. However, the Labor Office ordered the local council to pay KRW 800,000 in unpaid weekly holiday allowance and unused annual paid leave allowance since the complainant was a worker. The local council paid the amount ordered by the Labor Office. However, the complainant requested criminal punishment whether the delayed wages were paid or not. On February 17, 2023, the labor inspector visited the local council and conducted a labor inspection. The labor inspector pointed out 6 violations of the Labor Standards Act during the inspection, and ordered the payment of unpaid wages amounting to KRW 96 million, by March 7, 2023.

Herein, I would like to review the six violations pointed out by the labor inspectors during the inspection, and look carefully into three major disputed issues that came up: (1) the details on unpaid wages, (2) the retroactive scope of unpaid wages, and (3) criminal penalties against the local council.

Ⅱ. Details of the Corrective Orders from the Labor Inspection

On February 17, 2023, the labor inspector visited the local council and conducted a labor inspection on the tasks of administrative assistants, and issued corrective orders for six items.

1. Violation of the Labor Standards Act, Article 17, Paragraph 2 (Duty to Create a Written Employment Contract)

(1) Corrective order: Labor contracts shall be issued to workers and include specifications on major working conditions such as wages, contractual working hours, weekly holidays, and annual paid leave. However, since the working conditions of 133 audit assistants, including the complainant, were not specified in writing and issued to the assistants, evidence (copies of employment contracts, etc.) that this has been done must be submitted.

(2) Follow-up actions and basis: The local council acknowledged its failure to create and issue appropriate labor contracts and agreed to do so in the future. The assistants were, in fact, temporary workers to assist during specific periods of administrative audit, but, notwithstanding this, the employer shall preserve a register of workers and important documents concerning labor contracts for three years, as prescribed by Presidential Decree. These important documents related to labor contracts are:

① Labor contracts,
② Wage ledgers,
③ Documents on wage determination, payment method and basis for wage calculation,
④ Documents on employment, dismissal and termination of employment relations,
⑤ Documents about leaves, etc.

The three-year retention period for these important documents begins with the date of termination of the employment relationship. If the labor contract is not made in writing, the employer is subject to a fine of up to KRW 5 million.[1] In addition, if an employee requests a certificate verifying the period of employment, type of work, position and wages, and other necessary matters even after the worker resigns, the employer shall immediately provide such certificate with the actual facts thereon. Persons who can claim a certificate of employment shall be workers who have continuously worked for 30 days or more. Requests for such certificates can be made by the worker up to 3 years after resignation.[2]

2. Violation of the Labor Standards Act, Article 36 (Settlement of Payment)

(1) Corrective order: The employer shall pay all money and valuables including wages within 14 days from the date of the termination of employment relations, unless there is an agreement otherwise between the parties regarding an extension of the

---

1) Labor Standards Act, Article 42 (Retention of Contract Documents) and the Enforcement Decree, Article 22 (Subsidized Documents, etc.) and Article 114 (Penalty)

2) Labor Standards Act, Article 39 (Certificate of Use) and the Enforcement Decree, Article 19 (Requests for Certificate of Employment)

payment period. However, the local council failed to pay a total of KRW 96.1 million to its audit assistants: weekly holiday allowances of KRW 82.2 million (132 persons) and annual paid leave allowance of KRW 10.9 million (109 persons). Proof of payment must be submitted to the Labor Office (e.g. receipt of deposit or payment confirmation).

(2) Follow-up actions and basis: Considering the statute of limitations for overdue wages, the local council paid weekly holiday allowances and annual paid leave allowances to audit assistants who had worked during the past five years. If a worker dies or employment relations are terminated, the employer shall pay wages, compensation, and all other money and goods within 14 days from the occurrence of the reason for payment. However, it is specified that in special circumstances, the period may be extended by agreement between the parties. If money and other valuables are not paid within 14 days after the termination of employment relations, the employer will be subject to imprisonment for up to 3 years or a fine of up to KRW 30 million.[3)]

3. Violation of the Labor Standards Act, Article 48, Paragraph 2 (Pay Slips)

(1) Corrective order: When paying wages, the employer shall issue to the worker a wage statement in writing with matters as prescribed by Presidential Decree, such as the composition of wages, method of calculation, details of deductions, etc. and submit proof (copy of pay slips) to the Labor Office.

(2) Follow-up actions and basis: The local council acknowledged that it had failed to issue pay slips and agreed to correct the situation. The employer must issue wage statements to workers when paying them. This regulation applies even to workplaces with fewer than 5 employees, even if only one part-time worker is employed. In addition to a statement of the total amount, information related to the method of calculating wages must be written so that workers can confirm that they have been paid fairly in accordance with the amount of time they worked and the conditions given in the initial contract with the employer. If the employer fails to issue such a wage statement, an administrative fine of up to KRW 5 million won shall be imposed.[4)]

4. Violation of the Labor Standards Act, Article 60, Paragraph 2 (Annual Paid Leave)

(1) Corrective order: The employer did not grant annual paid leave to 109 audit assistants, despite the requirement that it grant one day of paid leave for every one month of work to workers who have worked continuously for less than one year. Verification materials must be submitted to the Labor Office.

---

3) Labor Standards Act, Article 36 of the (Settlement of Payment) and Article 109 (Punishment)
4) Labor Standards Act, Article 48, paragraph 2 (Pay Slips) and Article 116 (Administrative Fines)

(2) Follow-up actions and basis: The local council paid annual paid leave allowances to audit assistants who had worked during the past five years in accordance with the statute of limitations for unpaid wages. An employer shall grant one day of paid leave for every month of work to a worker who has worked continuously for less than one year. If such annual paid leave is not granted, the unused leave shall be compensated in money. If the annual paid leave allowance is not paid, the employer shall be subject to imprisonment for up to two years or a fine of up to KRW 20 million.[5)]

5. Violation of the Labor Standards Act, Article 70, Paragraph 1 (Restrictions on Night Work and Holiday Work)

(1) Corrective order: When a female worker aged 18 or older is required to work at night or on holidays, worker consent shall be obtained, but this was not done. Evidence needs to be submitted to the Labor Office that such consent was obtained.

(2) Follow-up actions and basis: The local council promised to thoroughly implement this requirement with employment of new workers. Female workers aged 18 or older may be allowed to work at night and on holidays with their prior consent. Violation of this is punishable with imprisonment for up to two years or a fine of up to KRW 20 million.[6)]

6. Violation of the Minimum Wage Act, Article 11 (Duty to Inform)

(1) Corrective order: The employer shall post the minimum wage in a place where the workers of the business can easily see it, or widely publicize it to workers in other appropriate ways, as prescribed by Presidential Decree. Since the minimum wage notice obligation has been violated, correct the matter and submit verification evidence (posted photos, etc.).

(2) Follow-up actions and basis: The local council posted the required information in a notice on its website. Employers have a duty to notify workers of the minimum wage by posting it in a place where workers can easily see it or by other appropriate means. Matters to be posted include ? the minimum wage of workers subject to application, ? wages that are not included in the minimum wage, ? scope of workers excluded from application of the minimum wage in the business in accordance with the law, ? the effective period of the minimum wage. Violation

---

5) Labor Standards Act, Article 2 and 5 (Annual Paid Leave) and Article 110 (Punishment)
6) Labor Standards Act, Article 70 (Restrictions on Night and Holiday Work) and Article 110 (Punishment)

of this duty to inform is punishable with a fine of not more than KRW 1 million.[7)]

Ⅲ. Major Issues Disputed on during the Labor Inspection

1. Details on unpaid wages

(1) Related details: An audit assistant who worked from October 11, 2022 to December 2 (39 days) submitted a claim to the Labor Office for unpaid weekly holiday allowance and annual paid leave allowance. The local council attended an investigation hearing of the Labor Office on December 28, 2022 and submitted to an investigation, and agreed the day after the investigation to pay KRW 800,000 for weekly holiday and annual paid leave allowances. On February 17, 2023, the labor inspector visited the local council and conducted a labor inspection on the employment relationship with audit assistants. The labor inspector found that the local council had not paid weekly holiday allowance or unused annual paid leave allowance during employment of its audit assistants. The Labor Office directed the local council to retroactively pay unpaid wages to all audit assistants employed during the last five years.

(2) Judgment: If a worker hired for hourly or daily wage continues to work, an additional weekly holiday allowance shall be paid. If wages are calculated on a monthly basis, the weekly holiday allowance shall be included in the monthly wage. A related precedent states that the hourly or daily wage system does not include weekly holiday pay, which is a statutory allowance under Article 55 of the Labor Standards Act (LSA), paid even if the employees do not actually work on such paid holidays. Therefore, if a worker on the hourly or daily wage system receives a fixed allowance paid for a certain period of time exceeding one month, he or she can claim the difference between the weekly holiday pay calculated based on the newly calculated hourly wage and the previously paid fixed allowance, and this is not a duplicated pay for the weekly holiday pay." [8)]

2. Retroactive payment of unpaid wages

(1) Related details: The labor inspector conducted an on-site audit on February 17, and on February 21, 2023, directed the local council to pay an amount equivalent to KRW 96.1 million, calculated as unpaid weekly holiday allowances of KRW 85.2 million (for 132 persons) and unused annual paid leave allowances of KRW 10.9

---

7) Minimum Wage Act, Article 11 (Duty to Inform) and Article 31 (Administrative Fine)

8) Supreme Court ruling on Jan. 28, 2010, 2009da74144; see also Supreme Court ruling on Aug. 20, 2014, 2014da6275

million (for 109 persons over the past 5 years between 2018 and 2022.

(2) Judgment: Extinctive prescription refers to expiration of the period during which an employee with the right to receive compensation may exercise a claim against the employer in the event of a delay in the payment of wages or severance pay. The extinctive prescription for prosecution refers to expiration of the period when prosecution can occur for violating labor law, such as delaying the payment of wages, and begins either on the date the violation occurred or the date a continuing violation ends.

The period before the extinctive prescription kicks in for prosecution of violation of labor-related acts in terms of delayed payment of wages was extended from 3 years to 5 years in 2007. The period before the extinctive prescription for prosecution kicks in shall be deemed to have started 14 days from the date the wages should have been paid or the date the violations terminate.[9] According to Article 49 of the LSA, the extinctive prescription for a wage bond kicks in after 3 years. However, since the extinctive prescription for prosecution is now 5 years, prosecution for delayed payment of wages will continue to be possible.[10] Thus, an employee may file a claim for unpaid wages for a period of 5 years.

3. Criminal punishment for late payment of wages

(1) Related content: On December 9, 2022, one audit assistant filed a complaint with the Labor Office that wages were overdue. On December 28, the local council was investigated by the Labor Office, and the next day, it paid KRW 800,000 in unpaid weekly holiday pay and unused annual paid leave. However, the petitioner requested criminal punishment for violation of the LSA, regardless of whether the unpaid wages were paid.

(2) Judgment: Late payment of wages is subject to criminal punishment. Workers who have received unpaid wage want their employer to be punished. However, prosecutors did not prosecute the local council as the employer responsible for the late payment of wages. The reason for this is that the local council's violation of the obligation to pay weekly holiday allowance and unused annual leave allowance was not intentional. A related precedent states, If there are grounds to dispute the existence of the obligation to pay wages and severance pay, it should be seen that there is a considerable reason why the employer did not pay the wages and severance pay. It is difficult to reason that the employer intentionally committed the crime of violating Article 36 of the Labor Standards Act (Settlement of

9) Criminal Procedure Act, Article 249, Paragraph 1, Item 5 (Duration of Criminal Prescription) and Article 252 (Starting Time for Statute of Limitations)

10) Ministry of Employment and Labor Guide, Guide on Handling Unpaid Wages, 2016, pp. 31-32.

Payment). Whether there are grounds for dispute regarding the existence and scope of the obligation to pay wages and severance pay depends on the reason for the employer's refusal to pay and the basis for the payment obligation, and the organization and scale of the company operated by the employer. Also, all matters such as business purpose, and the existence and scope of payment obligations, such as other wages, should be judged in light of the general circumstances at the time of the dispute. Even if the employer's civil liability for payment is recognized retroactively, it should not be immediately concluded that the employer's violation of Article 36 of the Labor Standards Act is recognized intentionally.[11)]

Ⅳ. Conclusion

This case is a good example of the characteristics of labor law. Labor law violations do not end with correction of a single person's violation. Through this example of unpaid wages for daily wage workers, the following characteristics of labor law can be understood. First, even if an administrative agency temporarily hires a commissioned worker, if that worker provides work under the management supervision of the employer and receives wages, employee status is recognized. Second, a notice of violation of the LSA is applied to all workers in the same category, and unpaid wages can be claimed retroactively for 5 years, which is the statute of limitations for criminal punishment. Thirdly, even if a violation regarding wages occurs, if there was no intentional violation of the law and there exists a legitimate reason for not paying the wages in question, criminal punishment may be avoided.

Workplace Sexual Harassment and Bullying: A Case Analysis

- Supreme Court ruling on November 25, 2021, 2020da270503 -

Ⅰ. Facts

1. Parties and Relevant Circumstances

The Plaintiff (P) was a contract employee for C Children's Hospital Sponsorship Association (hereinafter referred to as the "Association") from around March 2014. P was responsible for selecting and determining the scope of support for child patients to

11) Supreme Court ruling on June 28, 2007, 2007do1539.

receive support from the Association. The Defendant (D) was an outpatient professor at C Hospital and an Association director. D planned and conducted events for the Association and sometimes directly instructed or severely reprimanded Association employees in relation to their work.

On October 15, 2015, the day of a charity golf event hosted by the Association, P rode in a passenger car driven by D near D's home and traveled with D to the golf course, located in Icheon City. Afterwards, P assisted D with his duties in the VIP room provided at the golf course clubhouse for the event. After the event ended that evening, P sat in the back seat of D's passenger car, driven by a substitute driver, along with D for the ride back to D's home.

On the following day, October 16, 2015, P visited the manager (E) of the Association's office, and reported that she had been sexually assaulted by D on three occasions: (1) in the VIP room the day before, (2) inside D's car after the event ended, and (3) repeatedly over time in the workplace. On the same day, at E's direction, P prepared a list of incidents when D had harassed her and submitted it to E in an Excel file. On October 27, 2015, P filed a criminal complaint with the police regarding the sexual assault incidents. Although the prosecutor indicted D, he was later found not guilty.

2. Plaintiff (P)'s Claim

A. On October 15, 2015, at 2:05 PM, while in the golf course's VIP room, D ordered P to bring a tree branch to hit P with as punishment. P did so, and D proceeded to break it and then used it to strike P's buttocks, causing physical pain. Furthermore, at the same time and place, D sexually harassed P with remarks such as "Your skin is so white. You used to be skinny, but now you've put on weight." "Your legs are so thin and white. Are you using whitening cream? Do you shave your body hair?" and "Do you have a boyfriend? Why have you gained weight? You don't work properly and your mind is elsewhere."

B. On the same day, while in the car on the way back, D verbally reprimanded P and sexually harassed her by inserting his finger into her right ear and using an empty plastic water bottle to poke her on her chest.

C. From April 3, 2015, to October 2015, D called P to the examination room at C Hospital, where he worked as an outpatient medical practitioner, and asked her to

sit on a wheelchair and pulled her closer and tapped on her thighs.

D. D accused P, office manager E of the Association, a former employee, and P's lawyer who testified against him for sexual harassment, of submitting falsified evidence to the court by manipulating the facts. P claimed that it was an illegal act of secondary harm against P that abused the legal procedures.

3. Defendant (D)'s Claim

D denied the sexual harassment allegations leveled by P in the relevant criminal case and stated the following regarding what had occurred in the VIP room on October 15, 2015: D asked P to bring a tree branch to use as a punishing cane to hit her, saying that she had ruined the charity event. P brought a large branch that was over one meter long to the VIP room. When D asked her how many times she wanted to be hit, P said three times, and D broke the branch. P appeared to be crying, and D apologized to her for making her cry. P continued to fake cry, so D put his hand on her shoulder to stop her from lowering her head further and getting closer to her face to find out if she was really crying or not. When he saw that she was smiling, D grabbed P by the upper part of his elbow and pushed her away. During this process, D found out that P had a fat body, so D told P something to the effect of gaining weight On the same day and in the same place, D made remarks to P about P's calves, asked whether P had a boyfriend, and remarked about P's skin and use of skin-related products. At the above golf course, D once recommended that P use hot spring water to bathe.

4. Summary of the First Court Ruling[12)]

P claimed that D had sexually harassed her and reported the people who had witnessed the actions to the police, both of which amounted to illegal actions against P. P claimed compensation for mental suffering under the tort liability of Article 750 of the Civil Code. However, the court dismissed P's claim due to insufficient evidence.

5. Appeal (Original trial)[13)]

12) Seoul Central District Court ruling on Aug. 27, 2019, 2018gadan5252208 (Compensation for damage).
13) Seoul Regional District Court ruling on Sept. 18, 2020, 2019na54179 (Compensation for damage).

P appealed the decision, arguing that even if D's conduct mentioned in one of P's claims did not constitute "coercive sexual assault through the abuse of power," additional actions that D had intentionally committed against P during the investigation and trial constituted "illegal and inappropriate behavior equivalent to physical or verbal sexual harassment and bullying or harassment within the workplace" or "secondary acts of harm towards a victim of assault, insult, or sexual violence." Therefore, D had an obligation to compensate for damages caused by those illegal acts against P. However, the appellate court found that the evidence submitted by P in the first trial and additional evidence submitted remained insufficient to back up P's claims.

Ⅱ. Details of Supreme Court Ruling[14)]

The Supreme Court cited labor laws regarding workplace harassment and sexual harassment to make a decision in this case. Sexual harassment refers to behavior by a civil servant, employee of a public entity such as a state agency, local government or school, or employee, employer or superior at a workplace, or related to employment, using one's position or related to sexual conduct or sexual demands, etc., to make the other party feel sexually humiliated or disgusted, or to impose disadvantage or condition benefits on them. Here, the unwanted "sexual conduct" refers to physical, verbal, and visual acts related to physical relationships between men and women or physical characteristics of men or women that can objectively cause an average person in the same position to feel sexually humiliated or disgusted according to sound common sense and practices of the community. Furthermore, if a person in a higher position exceeds the proper scope of work and causes physical or mental pain to other employees or worsens the work environment through the use of his or her position or relationship in the workplace, this amounts to illegal "harassment at the workplace" and the cause of civil liability against the defendant for illegal acts against the victimized employee.[15)]

The Supreme Court acknowledged the consistent statements of the plaintiff and the defendant regarding workplace harassment and sexual harassment, which had been

14) Supreme Court ruling on Nov. 25, 2021, 2020da270503.
15) Supreme Court ruling on Apr. 12, 2018, 2017doo74702; Sept. 16, 2021da219529.

dismissed in the lower court due to a lack of evidence. "The claims that harassment in the workplace had occurred on the day of the voluntary event in the VIP room is mostly not disputed by D, and a significant portion of it was actively admitted by D in the related criminal case. In addition, considering the specificity and consistency of P's statement and the details of the victim statement summary sheet, as well as the timing and process of P reporting the damage to the support group and reporting to the investigative agency that she was suing D, and D's response in the related criminal case, there is ample room to find that P's claims about verbal sexual harassment in the same time and place are highly likely to be true."

The Supreme Court rejected the decision of the lower court and introduced the labor law definition of workplace harassment and sexual harassment in this case, rather than sexual assault by the employer. The Supreme Court stated, "Furthermore, D's behavior, which has been claimed to constitute harassment in the workplace or verbal sexual harassment, is conduct that exceeds the proper scope of work by D, a superior at the workplace, in an employment relationship, using his or her position to harass or treat other employees unfairly or to create a hostile working environment, and constitutes a violation of the Labor Standards Act."

Ⅲ. Commentary

1. Difference between Sexual Assault and Sexual Harassment

P accused D of sexual harassment and forced sexual contact through the use of work-related power in a VIP room and in a vehicle on October 15, 2015. However, D was found not guilty of the criminal charges, as this case fell under the category of workplace harassment and sexual harassment according to the Labor Standards Act, which should have been reported to the Ministry of Employment and Labor. P reported the case to the police as sexual assault, but the judgment was based on the difference between sexual assault and sexual harassment. Article 10 of the Sexual Violence Crimes Prevention Act defines forced sexual contact through the use of work-related power as "the use of hierarchical or authoritative power to engage in unwanted sexual contact against a person who is under one's protection or supervision in relation to work, employment, or other relationships." The Supreme Court defines sexual assault as "an act that objectively violates sexual morality and would cause sexual shame or disgust for an ordinary person, infringing upon the victim's sexual freedom.[16] In other

words, for sexual assault to be a criminal offense under the law, there must be violence or coercion that violates the victim's sexual freedom." In contrast, Article 2 of the Equal Employment Act defines workplace sexual harassment as "the use of one's position as an employer, superior, or worker to sexually harass another worker by making sexual advances or engaging in sexual behavior that causes sexual humiliation or disgust." Therefore, sexual harassment does not violate the victim's sexual freedom, but rather refers to behavior in which a superior or a worker harasses another worker through the use of their position or work-related language or actions. The current law imposes imprisonment or a fine for forced sexual contact through work-related power, and administrative fines for workplace or sexual harassment.

2. Burden of Proof

In cases of workplace harassment or sexual harassment, the burden of proof is crucial. Generally, it lies with the person making the claim, and if they fail to prove it, they lose the case. However, according to Article 30 (Burden of Proof) of the Equal Employment Act, "the burden of proof in disputes related to this Act shall be borne by the employer." Therefore, in matters related to this law, if an employee claims they have a grievance or have suffered damage, they only need to provide evidence that could lead judges or members of the labor commission to reasonably infer that the problems are related to the law.[17] In this particular case, even though the employer and the victim provided different explanations for the occurrence of harassment and sexual misconduct, the Supreme Court recognized P's claims of workplace harassment and sexual harassment as true, as it was reasonable to assume that such events had occurred.

3. Implications of the Ruling

The lower court ruling was dismissed as it mistakenly classified the case as falling under "sexual assault through coercion in the workplace" and failed to address the actual issue of "workplace harassment and sexual harassment." However, the Supreme Court ruled that the harassment and sexual misconduct committed by the superior in this case were not a result of work-related power dynamics but rather stemmed from the use of superior position or relationship in violation of labor standards, causing physical and mental pain to employee P. As a result, the Supreme Court overturned

16) Supreme Court ruling on Dec. 24, 2014, 2014do6416; Sept. 26, 2013, 2013do5856.

17) Kim, El-lim, "Employer's Responsibility for Sexual Harassment in the Workplace - Supreme Court Decision 95da39533, February 10, 1998," in Labor Case Law: 100 Cases, First Edition, Korean Labor Law Association, Parkyoungsa, 2014.

the lower court's ruling and acknowledged the workplace harassment and sexual harassment. Furthermore, the Supreme Court ruled that D's actions constituted "workplace harassment" and went beyond the acceptable boundaries of work, resulting in physical and mental pain for P, as well as "sexual harassment," which caused P to feel sexually humiliated or disgusted, both of which fall under the category of illegal acts under Article 750 of the Civil Code. Therefore, D was ordered to compensate P for the mental damages caused by his illegal actions.

Criteria and Methods for Selection of Employee Representatives

Ⅰ. Introduction

I received questions regarding the selection of employee representatives from Company D, for whom collective bargaining negotiations are underway. Company D is a manufacturing enterprise with a workforce consisting of 50 production workers and 30 office workers, totaling 80 employees. There are two labor unions composed of production workers only, with the majority union, Union 1, consisting of 30 members, and a minority union, Union 2, consisting of 20 members. Union 1 serves as the negotiating representative union. Despite not being a majority union, the chairman of the minority union, Union 2, has garnered support from a significant number of clerical workers and is acting as an employee representative in the labor-management council.

The company needed a written agreement with the employee representative regarding working on holidays and taking time off on substitute holidays instead. The first question raised by Company D is whether the employee representative in the labor-management council (representing Union 2) can be the party with whom an agreement can be reached on changes to the substitute holidays. The company has announced the selection of an employee representative for the purpose of substituting holidays for all employees. In response, the Chairman of Union 2, upon seeing the company's request for the appointment of an employee representative, obtained the consent of a portion of its own members (it did not include any members of Union 1) and some white-collar workers through a consent form circulated among the employees, which received majority consent. The second question is whether the current employee representative in the labor-management council can be recognized as the party with whom a written agreement can be made regarding the substitute holidays, based on the consent form that obtained the consent of the majority of employees. In relation to this, I will examine specific criteria and provide an answer.

Ⅱ. Validity of Employee Representative Selection

1. Reasons to Select an Employee Representative

While individual working conditions are determined by employment contracts, the determination of collective working conditions shall follow the principles in the Labor Standards Act regarding equal decision-making between labor and management. According to Article 4 of that Act, "Working conditions shall be determined through free and voluntary agreement between workers and employers, on the basis of equality." Based on this principle, changes in collective working conditions require written agreement of the employee representative.[18] An employee representative refers to a labor union organized by the majority of employees in cases where such a labor union exists, or an individual representing the majority of employees if there is no labor union representing the majority of employees.

Specifically, the role of an employee representative under the Labor Standards Act can be divided into three categories. First, when employers seek to change statutory working hours according to the Labor Standards Act and implement flexible, optional or discretionary working hours, compensatory leave, or alternative paid leave, they are required to obtain written agreement of the employee representative. Unilaterally changing the statutory working hours (40 hours per week, 8 hours per day) by the employer can lead to criminal punishment. However, if written agreement is obtained from the employee representative, there will be no criminal punishment.[19]

Second, for management layoffs, employers are required to engage in prior consultations with the employee representative. Management layoffs refer to cases where the company undergoes restructuring due to unavoidable business difficulties, without fault on the part of the employees. When implementing management layoffs, employers must notify the employee representative 50 days in advance, make efforts to avoid layoffs, and engage in sincere consultations regarding the employees to be laid off. The consultation process with the employee representative is a critical requirement for justifying the legitimacy of management layoffs (Article 24 of the Labor Standards Act).

Third, when making adverse changes to working conditions stipulated in the rules of employment, the consent of a majority of employees is necessary. In the case we are discussing herein, the consent of the employee representative representing the majority of employees is necessary. Changes to working conditions that do not receive consent of the employee representative shall be legally ineffective (Article 94 of the Labor Standards Act).

---

18) Kim, Mi-young & Park, Eun-jeong, "Workplace Autonomy, Labor-Management Council, and Employee Representatives," Labor Law Forum, Vol. 34 (2021), p. 122.

19) Lee, Seung-wook, "A Study on Measures for Improving the Employee Representative System in Labor Relations Law," Ministry of Employment and Labor, p. 25.

2. Ministry of Employment and Labor (MOEL) Guidelines and Precedents Related to Selection of an Employee Representative

(1) MOEL Guidelines

Under the Labor Standards Act, employee representative refers to an entity/individual representing the majority of employees within a specific business or workplace unit. Therefore, in principle, the employee representative shall be elected for the entire business. However, if certain provisions apply to specific occupations or job categories, solely basing selection of the employee representative on the entire workforce of the business might fail to adequately represent the interests of the affected employees. In regards to the "majority of employees in the business or workplace" mentioned in Article 94 of the Labor Standards Act concerning changes to rules of employment, the Supreme Court has stated that "if the adverse changes to the rules of employment only affect a specific group of employees and do not apply or are not expected to apply to other employee groups, then only the affected employee group becomes the subject of consent for the changes to the rules of employment."[20] Therefore, when introducing flexible working hour systems limited to specific occupations or job categories (such as facility workers), it would be permissible to select an employee representative who represents the majority of employees within that specific occupation or job category. The employee representative in such cases should be elected or determined through democratic methods such as voting or polling, involving the participation of a majority of employees in that occupation or job category.[21]

(2) Related Precedents

1) When multiple employee groups are part of a single system of working conditions and even if only one employee group directly suffers from the adverse changes to the rules of employment, if application of the changed rules is expected to affect other employee groups, both the directly affected employee group and the employee groups that can anticipate future application of the changed rules become the subjects of consent. However, if the working conditions are differentiated, and the changed rules only apply to specific employee groups, resulting in direct disadvantages for those specific employee groups, without anticipation that the changed rules will apply to other employee groups, only the disadvantaged employee group(s) become the subject of consent.[22]
2) In a case where a hospital laid off employees ranked 4th grade or higher, the Supreme Court stated that "when a hospital seeks to downsize primarily employees of 4th grade or higher, it is also necessary to engage in consultations with the

---

20) Supreme Court ruling on May 28, 2009, 2009doo2238.
21) MOEL Guidelines, Labor Standards section-1356, May 7, 2021.
22) Supreme Court ruling on May 28, 2009, 2009doo2238.

employee representative who can represent the interests of the employees in that rank. In this case, the employee representative claiming to have engaged in consultations regarding the layoffs consists mostly of employees ranked 5th grade or lower, temporary employees, and non-administrative staff, and since the majority of union members in the labor union, composed mainly of employees ranked 5th grade or lower, are not the target of layoffs and have little connection to the layoffs, it is unreasonable to consider the selection of the employee representative as fair."[23)]

3) The Seoul Administrative Court determined that "if an employer intends to carry out layoffs targeting only certain ranks of employees, unless there are exceptional circumstances otherwise, they shall engage in consultations with a representative who can represent the affected employees. It is not permissible to engage in consultations with a labor union that lacks representativeness. If interpreted differently, it would result in entrusting the fate of certain employee groups to individuals who cannot adequately reflect the opinions and interests of those certain employee groups."[24)]

Ⅲ. Validity of Method Used in Selecting an Employee Representative

1. Principles of Employee Representative Selection

If there is a labor union representing the majority of employees, that union becomes the employee representative. If there is no labor union representing the majority of employees, an individual shall be chosen who represents the majority of employees. Therefore, in cases where a majority labor union does not exist, a separate election shall be held to select an employee representative who represents the majority of the employees. Labor laws do not provide any specific regulations regarding the election of such an employee representative. Therefore, a fair procedure is necessary to adequately reflect the intentions of the employees in the respective business or workplace. Such a procedure shall involve a democratic election method that obtains the support of the majority of employees and does not allow for employer appointment or nomination.[25)]

2. Precedents regarding Selection of an Employee Representative

1) Selection of an employee representative shall follow a collective decision-making method, such as an election (including a meeting-based approach). The election of

---

23) Supreme Court ruling on Sept. 29, 2005, 2005doo4403.

24) Seoul Administrative Court ruling on Aug. 22, 2000, 99goo27292.

25) Do, Jae-hyung, Labor Representatives and the Written Agreement System under the Labor Standards Act, Labor Law Studies, Vol. 37, 2011, p. 102.

an employee representative shall be determined through an appropriate method (including anonymous voting) that allows individual employees to freely express their opinions in a meeting where employees gather in the same location. The elected individual, chosen by the majority of employees based on the results of such a process, shall be appointed as the employee representative.[26)]

2) Selecting an employee representative through individual circulation and signing cannot be considered a valid election method.[27)] However, in exceptional cases where employees are dispersed across multiple workplaces or when it is not feasible to hold elections or meetings at the same location, a method where employees freely nominate employee representatives by workplace or department and consolidate those nominations is permitted.[28)]

3) In cases where a majority labor union does not exist, designating labor-management council workers as employee representatives without a separate election procedure is not recognized. This is because the labor-management council serves a different legal purpose, with limited decision-making authority, while the flexible working hour system performs functions related to determining employment conditions.[29)]

Ⅳ. Answers to Questions Regarding Employee Representatives

1. Can labor-management council representatives serve as workplace employee representatives?

The purpose of a labor-management council is to promote the common interests of labor and management through participation and cooperation, but it does not involve making decisions regarding employment conditions (Article 1 of the Act on the Promotion of Employees' Participation and Cooperation). Therefore, a labor-management council representative cannot be considered as delegated with the authority of a workplace employee representative, such as the power to change substitute holidays. Consequently, the consent of the majority of employees cannot be equated with consent for changes in employment conditions by a labor-management council representative.[30)]

If the exercise of employee representative authority is explicitly specified and communicated in a manner that is easily recognized by the employees, such as through prior notice and public disclosure of the fact that the elected labor-management council worker will exercise employee representative authority, then that labor-management

---

26) Supreme Court ruling on July 26, 1977, 773da355.
27) Supreme Court ruling on June 24, 1994, 92da28556.
28) Supreme Court ruling on May 12, 2005, 2003da52456.
29) Supreme Court ruling on June 24, 1994, 92da28556.
30) Kim, Kisun, "Regulatory Status and Legislative Issues of the Employee Representative System in Labor Relations Law" National Assembly Legislative Research Institute, 2016, p. 64; Supreme Court ruling on June 24, 1994, 92Da28556.

council worker can be considered an employee representative.[31] In the case of Company D's labor-management council, however, there was no such prior notice during the selection of labor-management council workers, and therefore, they cannot serve as workplace employee representatives.

2. Is the employee representative selection method lawful?

Company D announced the need for a workplace employee representative to change paid holidays to substitute working days and requested that an employee representative be selected from among all employees. In response, the chairman of a minority labor union reported to the company that it was the employee representative based on written consent obtained from the majority of employees through a circulatory process. The question pertains to the legality of the employee representative selection method.

Administrative interpretations suggest that when there is no labor union organized by a majority of employees, the appointment process and method for the individual representing the majority of employees should be communicated to all employees, allowing for a voluntary and democratic selection process that does not restrict the participation of other candidates and recognizes the majority representation of employees.[32]

In this case, the workplace has a primary labor union, and negotiations between the primary union, representing union members' employment conditions, and the employer are ongoing. However, in the current situation, the labor-management council's employee representative violated the selection procedure by obtaining and submitting a circulatory consent form secretly, without undergoing a transparent opinion-gathering process. Therefore, that person cannot be recognized as an employee representative.

Ⅴ. Conclusion

The employee representative system is an important mechanism that limits unilateral decision-making by employers regarding employment conditions in workplaces where there is no labor union representing the majority of employees. However, the current employee representative system is temporary and lacks guarantees for the position of employee representatives. Additionally, no specific methods for the selection process of employee representatives have been provided, causing confusion in workplaces. Therefore, there is a need for institutional improvements in the operation, term assurance, and permanent establishment of the employee representative system.[33] We

---

31) MOEL Guidelines, Labor Standards section-1356, May 7, 2021.

32) MOEL Guidelines (Selection of Employee Representatives in the Absence of a Majority Labor Union in the Workplace) Sanjae Prevention Policy-3144, June 28, 2021.

33) Park, Ji-Soon, "The Concept of the Korean Employee Representative System," Labor Law Review, Vol. 42, April 2018, pp. 8-10; Lee, Seung-Wook, "Directions for Improving the Employee Representative System," Economic

hope that through improvement of the employee representative system, the fundamental principle of equal decision-making on employment conditions, as stated in the Labor Standards Act, can be realized in all workplaces.

and Social Labor Commission, May 2019, p. 123.

Feature Articles

Feature Articles: Recent Labor Issues

Application of the Vacation Savings Account System under Current Law

I. Introduction

While providing legal advisory services on labor law, I have been asked which is the better working condition: monetary compensation or guaranteed vacation for annual leave. I always explain that the use of vacation is better than monetary compensation, as the purpose for annual leave is to protect employee mental and physical health through rest, not to simply give employees more money. Even in the ILO (International Labour Organization) Paid Leave Convention (Article 132), guaranteed annual leave is the basic principle, and monetary compensation is allowed only upon resignation, etc. Korea's revised Labor Standards Act (LSA) of 2003 introduced that leave could be given in lieu of paying wages for overtime, holiday work, and night work, upon written agreement with the workers' representative. The Government Employee Service Regulations also introduced in 2015 that a certain number of unused annual leave days for which annual leave compensation is granted can be carried over to the year following their accumulation and used then.[34)]

In line with this trend, a bill to expand and reorganize the compensation leave system under the Labor Standards Act into a vacation savings account system for working hours was submitted in 2016.[35)] This bill supplements the current 'compensatory leave system' to allow workers to accumulate time equivalent to paid leave in addition to extended, night and holiday work and use it as leave if necessary, or supplement it with work after using the leave first. Unlike the existing compensatory leave system, this bill would see vacation used first and then repaying that vacation time with extended, holiday and night work, like paying off a credit card bill.[36)] Difficulties are expected in getting such a bill passed, as it may take on the form of a flexible working system. I would like to explain the way to convert, under the existing Labor Standards Act, the compensatory leave system for extended, night, and holiday work to the vacation savings account system for annual leave being carried over to the following year.

---

34) Article 16-3 of the National Government Employee Service Regulations (Banking Up Annual Leave)

35) Kim, Ki-seon, Introduction of the Compensatory Leave System for Working Hours, Journal of Law No. 37, Hanyang University Law Research Institute, 2020, p. 128.

36) Kim, Seong-tae (Nat'l Assembly rep.Liberty Korea Party), A Bill Proposed on Partial Amendment to the Labor Standards Act, May 30, 2016, Bill No.: 2000028.

II. The Compensatory Leave System and the Vacation Savings Account System for Working Hours under Current Law

1. The compensatory leave system under current law

The compensatory leave system is introduced only upon written agreement with the workers' representative, and involves vacation being granted in lieu of the wages that normally must be paid for overtime work, night work, and holiday work. The specifics of implementation must also be agreed upon in writing with the employee representative, and can be decided freely by labor and management within the scope of the existing Labor Standards Act.[37] The details of the written agreement with the workers' representative should include ? the scope of eligible workers, ? the scope of compensatory working hours, ? the settlement period, and ? how compensatory leave is to be used.

(1) Scope of eligible workers: The system can apply uniformly to all workers or only to specific workers.

(2) Scope of compensatory working hours: Overtime, holiday, and night work shall be subject to the system. What needs to be decided is whether or not any additional wage will be paid for the working hours subject to the compensatory leave system.

(3) Settlement period: This is where the length of time for which compensatory leave can be banked, which shall be no more than three years, in consideration of the extinctive prescription for wages.

(4) How compensatory leave is to be used: Does accumulated compensatory leave have to be used at once or is it divisible? In addition, measures necessary for the company to guarantee long-term leave need to be described, as do details on monetary compensation for the compensatory leave not used during the settlement period.

2. Vacation savings account for working hours

In order for a workplace to change the compensatory leave system to a vacation savings account system for working hours, the accumulated vacation savings must be used within the framework of current law on the premise of a labor-management agreement. The most problematic areas are deciding how long additional wages can be saved and the company's long-term vacation guarantee policy. Current law requires a settlement period be decided for vacation and monetary compensation for unused

37) Kim, Ki-seon, Introduction of the Vacation Savings Account System for Working Hours, Monthly Labor Review, June 2018, p. 24.

vacation. The Ministry of Employment and Labor (MOEL) considers the saving and use of overtime, holiday work and night work hours positively, and considers it legal for an employer to allow employees to use all the compensatory leave gained for working overtime, nights and holidays during a one-year period, the following year. If it is not used the following year, a written agreement must already be in place with the workers' representative that employees are to be financially compensated for the unused portion on the first regular wage payment date of the year following the year during which the leave was to be used.[38] Otherwise, the employer must ensure that the compensatory leave accumulated in lieu of overtime, holiday and night work performed by an employee in a specific year can be properly used up to three years after it is gained. In consideration of the extinctive prescription for wage claims, employees must be compensated for leave that has not been used within 3 years, even if leave has not been used due to reasons attributable to the employee.[39] Even if labor and management agree that the employer is not obligated to pay wages for any compensatory leave not used by the employee for causes not attributable to the employer within the settlement period for compensatory leave, such agreement has no effect.[40]

III. Annual Leave and the Vacation Savings Account System under Current Law

1. Annual paid leave system under current law

The purpose of the annual paid leave system is to guarantee sufficient leave to workers to help them recharge in the interest of protecting their mental and physical health, while at the same time guaranteeing social and cultural opportunities for workers.[41] ILO Convention No. 132 requires that two weeks of undivided annual leave be secured for each worker. The use of consecutive annual leave is guaranteed in Korea, for civil servants as well. In addition, if an application is made at least three months in advance for the use of consecutive annual leave of more than 10 days, the head of an administrative agency must approve it unless there are special circumstances dictating otherwise.[42]

Under the annual paid leave system, workers with less than 1 year of employment receive 1 paid leave day every month, while workers with at least 1 year of

38) Ministry of Employment and Labor Guidelines on Sept. 23, 2019: Retirement Welfare Dept.-4046.
39) Ministry of Employment and Labor Guidelines on Feb. 20, 2020: Wage & Working Hours Dept.-376.
40) Ministry of Employment and Labor Guidelines on Dec. 10, 2004: Labor Standards Dept.-6641.
41) Kim, Hong-Young, Theory on Improving the System of Annual Leave for Guaranteed Rest, Labor Law Study, 1st half of 2016, No. 40, Seoul National University Labor Law Research Society, p. 165.
42) Article 16-4 of the National Government Employee Service Regulations (Guaranteed use of at least 10 consecutive annual leave days).

employment receive 15 paid leave days if they attend 80% or more of their work days in 1 year. In addition, one accrued leave day is granted for every 2 years of continuous work, to a maximum of 25 leave days a year. If the vacation is not used within one year after it accrues, it is extinguished and converted into a right to claim monetary compensation (Article 60 of the Labor Standards Act, or LSA).

A system to promote the use of annual paid leave (Article 61 of the LSA) has been introduced so that all leave can be used within one year of the annual leave accruing. Promoting the use of annual paid leave in this way is designed to highlight that the purpose for annual leave is to help maintain employee mental and physical health, and that additional financial compensation is not preferable. Employees shall notify their employers of their vacation plans 6 months prior to the period in which the annual leave can be used and use it. Employers can designate the time of leave for any unused leave for which two months or less remains before expiry. The employee would then have to use his/her unused leave within that period. If the employee still does not use the leave despite these employer measures, the unused leave expires.

2. The vacation savings account system for annual leave

The current period for use of annual paid leave is one year, after which it is converted into monetary compensation. The vacation savings account system would allow unused annual leave to be carried over to the following year. In this regard, the MOEL provides guidelines that allow the use of unused annual leave during the following year. It would be a violation of the law to pay vacation allowance before the right to claim annual paid leave expires, as it would be to fail to grant the earned vacation leave. However, it is legal for two parties (employer and employee) to agree to carry over any unused annual leave instead of converting it to monetary compensation.[43] In addition, the Labor Standards Act stipulates that unused annual leave will expire if the employee comes to work on a designated vacation day and provides work. However, even if an employer has taken measures to promote the use of annual leave, the court holds that the employer has an obligation to compensate for unused annual paid leave if the employer has received the worker's labor provision without any objection related to the unused annual paid leave.[44]

Therefore, according to administrative interpretations and judicial rulings, the vacation savings account system for annual leave is sufficiently possible even under current law. However, in its implementation, individual consent by the employee is required, not a written agreement with the workers' representative. Carried-over unused annual leave is equivalent to an individual worker's wage claim, so the consent of the individual

43) Ministry of Employment and Labor Guidelines on Feb. 20, 2009: Labor Condition Dept.-1047.
44) Supreme Court ruling on Feb. 27, 2020: 2019da279283.

worker is required. At the end of the period of use of annual leave, the annual leave can be converted into wage bonds, which can be accumulated for 3 years and used as long-term leave.

A method that should be taken into consideration when introducing this system is the vacation savings account system for civil servants. In addition to the recommended number of annual leave days, unused annual leave can be deposited in a savings account for up to three years, allowing for long-term vacations. For example, civil servants who have been employed for 6 years or more receive 21 days of annual vacation. If they take the recommended minimum of 10 days as vacation, and then save 11 days a year for 3 years, depositing a total of 33 days over those 3 years, they can go on vacation for more than a month at a time.[45] Because of this attractive outcome, this vacation savings account system has been expanded from government organizations to public institutions and is in wide use.

IV. Applications

1. Introducing a vacation savings account system for working hours

In accordance with Article 57 (Compensatory Leave System) of the Labor Standards Act, the vacation savings account system for working hours can be introduced through a written agreement between labor and management, with the application as follows.

<Sample Labor-Management Agreement to Introduce a Vacation Savings Account System for Working Hours>

Representative Director 000 of AA Co., Ltd. and Worker Representative 000 of AA Co., Ltd. agree to implement the compensatory leave system pursuant to Article 57 of the Labor Standards Act as follows.

1. Scope of eligible workers: All regular employees of the company are covered.
2. Scope of compensatory working hours: Overtime work that exceeds contractual working hours, or holiday work in which work is provided on a statutory holiday or contractual holiday. However, this does not include night work allowances for field workers.
3. Settlement period: The settlement period is from January 1 to December 31, while the period for use of the leave days to be within one year of the year following the date the leave is accumulated. Leave that remains unused

45) Hwang, Soo-yeon, Civil servants can take more than a month's leave due to 'annual leave savings,' Joongang Ilbo, Sept. 30, 2015.

after this settlement period shall be converted to financial compensation for the employee by the first month after the end of the settlement period.

4. How compensator leave is to be used: The company guarantees 10 days of summer vacation for workers to ensure a lengthy time away from work. If a request is to be made for other long-term leave, it must be made at least 3 months in advance. In return, the company guarantees the timing of the requested leave unless special circumstances exist otherwise.

April 1, 2022

AA Co., Ltd. CEO ○○○ / AA Co., Ltd. employee representative ○○○

2. The vacation savings account system for annual leave and the long-term annual leave guarantee regulations introduced by public institutions

<Introduction through the Rules of Employment>

Article 21 (Banking up annual leave)

① Employees may save a portion of their unused annual leave for later use, for up to three years as of the last day of the year it was accumulated.

② Any banked up annual leave shall expire if it is not used within two years after the three-year period in paragraph (1).

③ Annual leave allowance shall not be paid for annual leave saved pursuant to paragraph (1) and annual leave that has expired pursuant to paragraph (2).

④ In addition to the matters stipulated in Paragraphs 1 through 3, matters concerning the procedure for saving up and using annual leave, etc. shall be determined by the company president.

Article 22 (Guaranteed Use of Annual Leave of at least 10 Consecutive Days)

① If an employee applies for annual leave for 10 or more consecutive days 3 months in advance and shall use the banked up annual leave under Article 21, it shall be approved if doing so will not unduly impede the employee's performance of his or her duties. In this case, the company shall make the necessary efforts to ensure smooth operation and free use of annual leave, such as by designating a business agent to handle the employee's work during his or her use of the annual leave.

② In addition to the matters stipulated in Paragraph 1, the president shall determine any other matters necessary in regards to the application procedure for the use of annual leave for 10 consecutive days or more.

V. Conclusion

The ILO's Paid Leave Convention (No. 132) also stipulates that 3 weeks of leave must be guaranteed for a one-year working period, and that at least 2 consecutive weeks must be allowed to be used as leave (Articles 3 and 8). Through long-term leave used in return for work, workers can better maintain their mental and physical health and their dignity as human beings through social and cultural activities. Therefore, it is necessary to recognize that guaranteeing long-term leave is more desirable for workers than monetary compensation in lieu of leave. In addition, guaranteeing long-term leave is virtually impossible unless it is systematically implemented through a company's collective leave policy or introducing the employer's obligation to make such a guarantee through the rules of employment. Therefore, a long-term leave guarantee policy is very much needed, along with a vacation savings account system for working hours and annual paid leave.

The Confusing Administrative Interpretation from the Ministry of Employment and Labor on Calculating Severance Pay

I. Introduction

The recent administrative interpretation of severance pay calculations by the Ministry of Employment and Labor (MOEL) is causing confusion in many companies.[46] If a worker who receives 2 million won per month in fixed wage has worked for one year and resigns, he must receive 2 million won in severance pay (total wage for 3 months: 6 million won/90 days x 30 days average wage). However, the MOEL guidance says it should be 2,296,650 won and is ordering companies to be punished if they do not pay the additional 296,650 won. In the case of ordinary wages, if the monthly salary, 2 million won, is divided by 209 monthly contractual working hours, the hourly ordinary wage is obtained (2 million won/209 hours). If this hourly ordinary wage is multiplied by 8 hours, which is the contractual working hours in a day, the normal wage for one day is calculated (hourly wage 9,569 won x 8 hours = 76,555 won). Since the daily ordinary wage is higher than the daily average wage, multiplying the daily ordinary wage by 90 days becomes 2,296,650 won (76,555 x 90 days of

46) Han Kyung-hee, Is the higher ordinary wage more often used than the average wage in calculating severance pay? Korea Apartment Daily, Sep. 15, 2020; Goh Hee-kyung, Disputes in calculating severance pay at an apartment workplace due to ordinary wage being higher than average wage... Why? Apartment Management Newspaper, July 24, 2020.

daily ordinary wage). This recent administrative interpretation states that, citing Article 2 (2) of the Labor Standards Act (LSA), if the hourly average wage of a worker is lower than the hourly ordinary wage, that hourly ordinary wage shall replace the hourly average wage.

However, this administrative interpretation violates the method for calculating severance pay under the current Employee Retirement Benefit Guarantee Act (the ERBG Act) and does not fit the interpretation of the law by the courts. The ERBG Act states that the principle of calculating severance pay is based on the average wage, and in particular, 1/12 of the total wage for the defined contribution (DC) retirement pension is specified. Court rulings also state that, in calculating average wage, the basic principle is to use the ordinary living wage of workers.[47)]

Hereby, I would like to look at where the contradictions in the MOEL's administrative interpretation occur, and also examine in detail whether it is appropriate to use ordinary wage rather than average wage in the calculation of severance pay.

Ⅱ. Reasons Why Ordinary Wage is Higher than Average Wage

1. Reduction of statutory working hours

What is at issue here is that Article 2 (2) of the Labor Standards Act states that if the average wage is lower than the ordinary wage, the ordinary wage shall be the average wage. This provision did not change even when, on March 29, 1989, the existing statutory working hours per week were reduced from 48 hours to 44 hours per week. And on September 15, 2003, the statutory working hours per week were reduced to 40 hours, but there was no change to the provision. That is, the contractual monthly working hours are 240 hours in the 48-hour workweek system, 226 hours in the 44-hour week system, and 209 hours in the current 40-hour week system. Therefore, at the present time, contrary to the purpose of this article, the average wage must be lower than ordinary wage.[48)] In other words, the average wage obtained by dividing the total wage by 30 days is actually lower than the ordinary wage, as the ordinary wage becomes the amount obtained by dividing the wage for 20 days by 30. On the other hand, since the ordinary wage is 6 days a week including the weekly holiday allowance, the monthly ordinary wage is divided by 25 days. In this way, the ordinary wage is always higher than the average wage.

2. Changes in the wage structure

In December 2013, the Supreme Court ruled on a very important case related to ordinary wage that regular annual bonuses and various monthly allowances were

47) Supreme Court ruling on Nov. 12, 1999: 98da49357.
48) Koo Kunseo, Strange severance pay calculation, Korea Economy Daily, Jan. 16, 2022.

included.[49] As a result of this ruling, the annual fixed bonus system, which was the basic framework of Korean company wage structures, was abolished in 2014. The ruling simplifies wage structures. In other words, Korea's wage structure has come to consist of basic wages, legal allowances, and incentives since then, which increased the level of ordinary wages greatly.

Ⅲ. Method for Calculating Statutory Severance Pay and Problems with Recent MOEL Guidelines on Calculating Severance Pay

1. How to calculate statutory retirement pay

The ERBG Act stipulates that severance pay is calculated as average wage equivalent to 30 days for each year of the relevant worker's continuous service. In the defined benefit (DB) pension system, an amount calculated as the average wage of 30 days for each year of continuous service is deposited into the retirement pension account. In the defined contribution (DC) retirement pension system, 1/12 of the total annual wage is deposited into the retirement pension account. This is equivalent to 8.3% of the annual salary. Because a defined contribution (DC) retirement pension system pays a fixed amount each year, it cannot be recalculated later because the ordinary wage is higher than the average wage.[50] As such, it can be said that severance pay is clarified by calculating the average wage, which is the total wage, in the ERBG Act.

In this way, severance pay and retirement pension are calculated with the average wage, which is the total wage. The reason for calculating and paying the average wage is to protect the living wage of workers and to match a certain wage level in terms of severance pay or accident compensation. The Labor Standards Act provides three ways to protect the level of average wage. First, if the average wage is lower than the ordinary wage, it is stipulated that the ordinary wage shall be the average wage (Article 2, Paragraph 2). Second, the calculations of average wage exclude the probationary period of workers, periods of absence due to reasons attributable to the employer, periods of maternity leave, periods of recovery from work-related illnesses or accidents, periods of childcare leave, periods of legal industrial action, etc. This is an exception to the calculation of average wage, and is a limited enumeration provision to prevent the average wage from being unreasonably low in special cases for workers.[51] Third, despite the exceptions to the above Enforcement Regulation to the Labor Standards Act, if the average wage fluctuates significantly due to the worker's accidental circumstances, the notice on special cases for calculating the average wage determined by the MOEL (Article 4 of the Enforcement Decree to the LSA) is applied.[52]

---

49) Supreme Court ruling on Dec. 18, 2013: 2012da89399, 2012da94643.
50) Supreme Court ruling on Jan. 14, 2021: 2020da207444.
51) Supreme Court ruling on July 25, 2003: 2001da12669.

2. Problems in using ordinary wage when calculating severance pay

Currently, the MOEL is saying that severance pay should be calculated using ordinary wage when the average wage is lower than ordinary wage.[53] However, in principle, severance pay should be based on calculations using the average wage, and ordinary wage should help to prevent a decrease in severance pay if average wage is lower. Currently, the severance pay and defined benefit (DB) retirement pension plan under the ERBG Act are calculated as the average wage of 30 days for each year of continuous service. One-twelfth of the total annual wage for defined contribution (DC) retirement pension plans is taken as a reserve fund. According to this guideline, all calculations of retirement benefits that currently reflect average wages should be converted to reflect ordinary wages (Article 12 of the ERBG Act). If this happens, the calculation system of the ERPG Act will be broken, resulting in chaos. In other words, the administrative interpretation of the MOEL is not in line with the interpreted purpose of this Act, as it results in the use of the ordinary wage as a supplement to the average wage used in the calculation of severance pay.

Ⅳ. Purpose of Average Wage in Calculating Severance Pay and the Clause to Use Ordinary Wage in Exceptions

1. Purpose of using average wage in calculating severance pay

The severance pay system was introduced to ensure that companies can guarantee an income for their workers in their old age when there was no old-age pension in Korea. Therefore, the calculation of severance pay using average wage, which is the total amount of wages, was prepared in consideration of the fact that there is no disadvantage by reflecting the ordinary living wage of workers.[54] Since the total wage is the average wage, it has always been higher than ordinary wage, which reflects only fixed and regular wages. For this reason, Article 46 of the Labor Standards Act stipulates that 70% of the average wage or 100% of the ordinary wage must be paid as leave of absence allowance for periods attributable to the employer. This is because the use of average wages is the basis for severance pay regulations and accident compensation for workers. However, ordinary wage is calculated for the purpose of calculating hourly wage, and so such ordinary wage is used when calculating paid allowances stipulated in the Labor Standards Act, such as overtime pay and unused annual allowance under the Labor Standards Act. Because ordinary wages refer to fixed and pre-promised wages paid for the contractual working hours when a labor contract is drawn up, while the average wage is paid according to the rate of attendance at work, it does not decrease.

---

52) Supreme Court ruling on June 25, 2020: 2018da292418.
53) MOEL Guidelines: Labor Standards-3405, Aug. 25, 2020.
54) Supreme Court ruling on April 12, 1994: 92da20309; Supreme Court ruling on Nov. 12,1999: 98da49357.

2. Reasons for placing the clause to use ordinary wage in exceptions when calculating severance pay

The basic principle of average wage is to calculate the ordinary living wage of workers as a matter of fact. Severance pay is based on the average wage for the same reason.[55] According to Article 2 (2) of the Labor Standards Act, if the total wage decreases due to abnormal work, the average wage will be lower than the normal wage, so then the ordinary wage is used.[56] The precedent also stipulates that if the amount calculated as the average wage is lower than the ordinary wage of the worker concerned, the ordinary wage shall be the average wage in Article 2 Paragraph 2 of the Labor Standards Act. The purpose for this is to guarantee the minimum average wage in case the wage is significantly lower than in normal cases due to reasons attributable to the worker or an inability to work normally due to reasons attributable to the worker during the three months prior to the occurrence of the reason for calculating the average wage.[57] Here, ordinary wages refer to fixed wages in advance that are set to be paid regularly and uniformly regardless of the actual provision of work. For this reason, Article 2 (2) of the Labor Standards Act is used in cases where the average wage falls short of the ordinary wage.[58]

V. Conclusion

Severance pay is the wage calculated as the average wage of 30 days per year of a worker's continuous service. Here, the average wage falls short of the ordinary wage in situations in which workers are not protected by law, such as for absenteeism or personal leaves. At present, the ordinary wage is often higher than the average wage even in general cases, not just in special cases. This is because the standard calculation formula for ordinary wages is calculated on the basis of 6 days (including weekly holidays) in the 40-hour work week system, while average wage is calculated on the basis of 7 days a week. Accordingly, the provision in Article 2 (2) of the Labor Standards Act shall be added as a supplement when the average wage is lower than the ordinary wage, because the average wage shall be applied in accordance with the purpose of the Act. This is because, as can be seen with the MOEL's recent administrative interpretation, if the formula for calculating severance pay with ordinary wages is established, the severance pay systems in the Retirement Benefit Guarantee Act must be revised completely.

---

55) Supreme Court ruling on Nov. 12, 1999: 98da49357.
56) Gwangju Appellate Court ruling on Dec. 22, 2015: 2004nu1062.
57) Seoul Administrative Court ruling on July 1, 1999: 98gu19789.
58) Supreme Court ruling on June 28, 1991: 90daka14758; Supreme Court ruling on Dec. 26, 1990: 90daka12493.

Promoting Employment of Foreign Migrant Workers

- Foreign Domestic Workers in Singapore -

Bongsoo Jung / Korean labor attorney at KangNam Labor Law Firm

Contents

Ⅰ. Introduction

The most well-known social problems in Korea are its low birthrate and aging society. Towards mitigation of these issues, the government has spent a massive amount on subsidies through its multi-child family policy, and has made every effort to increase the birthrate through government work and family support policy.[59] However, there has not been any significant improvement.[60] There are several reasons for the lower birthrate, but I'd like to look at two in particular: 1) women are delaying marriage and childbirth to develop their careers; and 2) raising children in Korea is very expensive. Hiring babysitters is one of the highest costs, amounting to approximately KRW 1.5 to 2.5 million per month. In particular, due to the considerable expenses involved in childcare for working couples, women usually quit their jobs when they are pregnant with their second baby. However, as Singapore, Hong Kong, and Taiwan pay only between KRW 400,000 and 600,000 per month for domestic workers, they can afford

59) Maeil Business News, Birthrate remains at 1.12 to 1.19 despite investing KRW 150 trillion over the past 10 years, February 4, 2015

60) Maeil Business News, 40% of unmarried women do not intend to have a baby. Survey by the Federation of Korean Industries August 12, 2016

live-in help[61].

Singaporean women rarely quit their jobs after marriage, childbirth, or while raising their children.[62] This is possible because people in the middle class are able to employ low-cost foreign domestic workers to assist them. Singaporean domestic workers number 227,100 people, or 4% of Singapore's total 2016 population of 5.54 million.[63] The Singaporean government directly manages foreign domestic workers under a systematic and thorough management system that ensures it can continuously provide good-quality personnel.[64]

This study introduces Singapore's Foreign Domestic Servant Scheme and evaluates the related immigration policy. Based upon this Scheme, I would like to review whether this success in Singapore can be reproduced in Korea, and if so, what existing labor laws need to consider at the time of introduction of a similar program.

Ⅱ. The Foreign Domestic Servant Scheme in Singapore

The Foreign Domestic Servant Scheme in Singapore is managed under systematic government supervision. Namely, the government provides a stable supply of foreign domestic workers through its Work Permit system and also through a high employment tax. The government takes special measures to protect these foreign domestic workers through direct management of their health and safety. In the manufacturing industry, one foreign worker per two Singaporean workers is permitted for each company within the maximum quota available under the employment permit system as of 2015,[65] while

---

61) The term 'domestic worker' is used to refer to domestic maids, including house helpers, housekeepers, babysitters, nannies, and house maids. Article 11 of the Labor Standards Act describes such workers as 'housekeepers', while the International Labour Organization uses the term, 'domestic worker'. Hereby I follow the term used by the ILO. (Reference: Youngsoon Kim, The number and meaning of Korean domestic workers† 「Social Science Thesis Journal」 Vol. 45, Social Science Research Center, 2015, p. 64)

62) Statistics from the Korean Ministry of Employment and Labor and the Singaporean Ministry of Manpower as of December 2014: The Singaporean female employment rate stood at 60%, while the Korean female employment rate stood at 49.5%.

63) Hyejoon Kim, People disappearing inside my city, 「Cogito」, Institute of Humanities at Busan University, 2011, p. 120; Hong Kong's domestic workers number 266,778 people (or 3.64%) out of a total city population of 7,020,400, as of the end of 2009 (Indonesians = 48.7%; Filipinos = 48.5%).

64) Source: National Statistical Office Korea'sDomestic Workers (2010-2013)

Year	2010	2011	2012	2013
Total Population	49,410,366	49,779,440	50,004,441	50,219,669
Domestic Workers	194,801	202,394	264,665	279,103
Domestic Workers as % of Total Population	0.39%	0.41%	0.53%	0.56%

65) Channel News Asia, Not viable to relax foreign worker quota: Lim Swee Say, an interview with the Minister of Manpower, June 3, 2015.

foreign domestic workers can be hired under the Work Permit system without a maximum.[66]

Hereafter, I would like to look in detail at the employment procedure scheme for foreign domestic workers in Singapore and expenses that the employer should bear.

1. Background to the Foreign Domestic Servant Scheme

On June 5, 2016, the Singaporean newspaper, The Straits Times featured an article entitled Can Singaporeans do without maids? This news article was related to the announcement by the Indonesian government that it would limit the number of domestic workers going to Singapore if their domestic workers could not stay in dormitories outside the employers' houses. The following excerpt from the feature article explains why and how the Singaporean government introduced and utilized foreign domestic workers[67].

From the 1930s to 1960s, employing live-in help was the domain of expatriates and wealthy local employers. This was the time of the legendary amahs, women hailing mostly from Guangdong province in China and distinctive due to their plaited hair and "uniforms" comprising white blouses and black pants. Regarded as part of the family, they were figures of respect. Most families gave their amahs the leeway to discipline the children, allowing them to function as another "parent". But when Singapore industrialized from the late 1960s, more Singaporean women took up jobs in factories and offices, sparking a need for paid domestic help to look after the home. So the Government introduced the Foreign Domestic Servant Scheme in 1978, enabling women from neighboring countries, including the Philippines, Sri Lanka and Thailand, to be employed as paid domestic help. From a base of about 5,000 in the late 1970s, the number has grown, and there are about 227,100 foreign domestic workers here today. The labor force participation rate of married Singaporean women comprising citizens and permanent residents, meanwhile, has increased from 14.7 per cent in 1970 to 63.2 per cent last year. Unlike the much-loved amahs, maids today are treated by many families as an employee who happens to live in their home, say representatives of migrant workers' groups.

The skills required of a maid are also higher today. Some are expected to help

66) The Straits Times, Hiring maids becoming more costly with tighter regulations, January 19, 2015.
67) The Straits Times, Can Singaporeans do without maids? June 5, 2016

children with ever-demanding homework and to have the computer skills to assist them; care for the elderly, which has become more complex in terms of nursing skills; and run the home, which involves operating sophisticated appliances and being able to cook according to dietary demands. And Singaporeans get all these comparatively cheaply. The services of a live-in Indonesian maid start from $815,[68] taking into account her salary and the monthly $265 levy, but excluding costs of insurance, food and medical care. There are levy concessions for families with young children and elderly parents. In contrast, a bundle of specialized services - for home cooked catered meals, weekly cleaning and caregiving for the elderly or children - could easily add up to more than $2,000[69] a month.

2. The Work Permit system for foreign domestic workers[70] and employment procedures[71]

When intending to employ a foreign domestic worker in Singapore, the employer shall prepare the necessary prerequisites and request the Ministry of Manpower for employment. If approved, a work permit will be issued within two weeks. However, as this process can be complicated, employers usually use a private employment agency and pay its service fees.

(1) Work permit details[72]

A work permit is generally issued to foreign-unskilled or semi-skilled workers for a period of two years, but can be renewed. Eligibility to maintain the work permit is as follows:

1) The employer shall comply with the following conditions:

① The employer shall hire a qualified foreign worker for the relevant work;

② The employer shall pay the fixed salary that was previously reported to the Ministry of Manpower;

---

68) Singaporean currency: KRW 822 per Singapore dollar as of September 2016; SGD 815 = KRW 669,930. In the event of eligibility for the concession rate, the employment tax of SGD 265 is reduced to SGD 60. In this case, the monthly cost becomes SGD 610, or KRW 501,420.

69) SGD 2,000 = KRW 1,844,000

70) Singaporean Ministry of Manpower, http://www.mom.gov.sg/passes-and-permits/work-permit-for-foreign-domestic-worker

71) Reference at Singaporean employment agency: http://www.homekeepermaidagency.com.

72) Singaporean law, 「Employment Of Foreign Manpower Act」

③ The employer shall bear the costs of upkeep and medical treatment of the foreign employee;
④ The employer shall provide the foreign employee with acceptable accommodation;
⑤ The employer shall provide medical insurance to cover the costs of hospitalization and surgery;
⑥ The employer shall allow the foreign worker to be examined and treated by a doctor registered in Singapore. In cases where the foreign worker is not deemed suitable for work after medical evaluation, the Work Permit for the foreign employee shall be cancelled;
⑦ The employer shall pay the employment tax for each foreign worker;
⑧ The employer shall purchase a security bond for foreign workers (Malaysian workers excepted);
⑨ The employer shall not demand or receive any costs or benefits from the employment agency in relation to the employment of a foreign worker.

2) The foreign worker shall comply with the following conditions:
① The foreign worker shall be engaged in the job stipulated in the Work Permit, and work only for the employer;
② The foreign worker shall not be engaged in other business (including personal money-making business);
③ The foreign worker shall reside in the place designated by the employer;
④ The foreign worker shall consistently perform the job allowed under the Work Permit, and agree to a relevant civil servant requesting confirmation through inspection;
⑤ The foreign worker shall not marry a Singaporean or a permanent resident of Singapore inside or outside Singapore without prior report to the Ministry of Manpower;
⑥ The foreign worker shall not be pregnant or give birth in Singapore during the Work Permit unless that foreign worker has married a Singaporean or a permanent resident of Singapore after obtaining permission from the Ministry of Manpower. This regulation also applies to expired, cancelled, or revised periods on the Work Permit.

(2) The hiring process[73)]

Hiring procedures can be classified into three stages.

Stage 1: Getting ready & selection
① Employer attends orientation program
② Look for a candidate. Employer should come to an agreement with domestic worker on employment terms (e.g. salary, rest days).

---

73) Adapted from the Singaporean government website: E-service, http://www.ecitizen.gov.sg/Topics/Pages/Foreign-domestic-helpers-How-to-hire.aspx

Stage 2: Before the foreign domestic worker's arrival in Singapore

③ Employer shall apply for a Work Permitfrom MOM (Ministry of Manpower). If the application is approved, MOM will send employer an in-principle approval letter.

④ Employer shall place asecurity bond with MOM.

⑤ Employer shall purchase personal accident and medical insurance for the foreign domestic worker.

⑥ Employer shall mailthe in-principleapproval letter (ornotification letter) and an air ticket note to the foreign domestic worker.

⑦ If the foreign domestic worker will be working in Singapore for the 1st time, book online forthe settling-in program (SIP) training course. Employer will need copies of the foreign domestic worker's passport and education certificate.

Stage 3: Upon the foreign domestic worker's arrival in Singapore

⑧ Within 3 days of the foreign domestic worker's arrival, employer shall send her for the 1-day SIP course (if foreign domestic worker is working in Singapore for the 1st time).

⑨ Within 14 days after arrival, employer shall send the foreign domestic worker for amedical examination.

⑩ Employer shall request online for MOM to issue the Work Permit. MOM will inform employer of when to collect the Work Permit.

⑪ Within 1 month of the foreign domestic worker's arrival in Singapore, employer shall make the 1st monthly levy payment.

3. Details of the Foreign Domestic Worker Scheme[74)]

(1) Foreign domestic worker requirements

The hired foreign domestic worker needs to meet the following requirements: Female; From 23 to 50 years of age at the time of application; From an approved source country or territory, including Indonesia, Philippines, Myanmar, Sri Lanka, etc.; Minimum 8 years of formal education. According to comments by Singaporean citizens, foreign domestic workers are very popular and a majority of them have bachelor degrees from universities.

(2) Employer requirements and obligations

The employer shall be 20 years or older in age, own an appropriate house and have financial capability. The Singaporean government supervises the employer's responsibilities strictly. The employer shall not assign the foreign domestic worker to work other than housekeeping and shall not let her work part-time either. In the event an employer is caught assigning a foreign domestic worker illegally, a fine of up to SGD 10,000[75)] will

74) Adapted from the Singaporean Ministry of Manpower website, http://www.mom.gov.sg, Foreign domestic worker

be levied. For the first violation, the employer will be barred from using foreign domestic workers permanently. In cases where the employer uses a foreign domestic worker without a qualified Work Permit, the employer shall be fined a minimum of SGD 5,000 to a maximum of SGD 10,000 or imprisoned for up to one year.

(3) Documents necessary for work permits

1) Security bond, medical insurance and personal accident insurance

When applying for a work permit for a foreign domestic worker, the employer shall submit a security bond and evidence of medical insurance and personal accident insurance. These three items can be purchased as one package.

A security bond is a binding pledge to pay the government up to SGD 5,000 if the employer breaks the law or the conditions governing the employment of a foreign domestic worker (Malaysians excepted). This security bond will be returned if the employer does not use the foreign domestic worker or once she returns back to her home country. However, if the employer or the domestic worker is found to be in violation of any of the conditions of the work permit, if the employer does not pay her salary on time, or if the employer fails to send her back if she goes missing, the security bond may be forfeited. Provided, if the foreign domestic worker goes missing and the employer has made reasonable efforts to locate her and has filed a police report, half of the security bond (SGD 2,500) will be forfeited.

2) Medical insurance and personal accident insurance

The employer needs to buy medical insurance with coverage of at least SGD 15,000 per year for inpatient care and day surgery during the foreign domestic worker's stay in Singapore. The employer also needs to buy personal accident insurance with a minimum coverage of SGD 40,000 for the foreign domestic worker. This compensation should be made payable to her and her beneficiaries. The employer shall submit the information of insurance details when the foreign domestic worker's work permit is issued or renewed.

(4) Pre-employment medical examination for the foreign domestic worker

The employer needs to submit the documents of the foreign domestic worker's pre-employment examination before her work permit is issued. The employer must send the foreign domestic worker for a medical examination by a Singapore-registered doctor within 2 weeks of her arrival in Singapore. Her work permit will only be issued if

75) Singaporean currency SGD 1 = KRW 822, therefore SGD 10,000 = KRW 8,220,000

she passes the medical examination. Otherwise, she will have to be sent home. The medical examination screens the foreign domestic worker for 4 types of infectious disease (tuberculosis, HIV, syphilis and malaria).

(5) Employers' orientation program

The employer needs to attend the Employers' Orientation Program (EOP) if the employer is hiring a foreign domestic worker for the first time or has changed workers frequently. First-time employers must complete the EOP at least 2 working days before submitting a work permit application. The EOP is a 3-hour program that will help employers understand their role and responsibilities as employers of foreign domestic workers.

(6) Settling-in Program

Employers must send first-time foreign domestic workers for the Settling-in Program (SIP) within 3 days after their arrival in Singapore (excluding Sundays and public holidays). The SIP is a 1-day orientation program to educate foreign domestic workers on safety precautions and life in Singapore. The employer shall pay for the costs and time spent for the foreign domestic worker to attend the SIP. The topics covered include introduction to Singapore, employment conditions, safety at home, and management of relationships and stress.

(7) Semi-annual medical examinations

During the foreign domestic worker's employment, the employer must send her for a medical screening every six months. This medical examination screens for pregnancy and infectious diseases such as syphilis, HIV and tuberculosis. If the foreign domestic worker fails the required results of this semi-annual medical examination, the employer must send her home immediately.

(8) Repatriation

The employer shall perform all the necessary duties to repatriate her to her home country once the foreign domestic worker's employment period is expired. The employer shall inform the foreign domestic worker of the expiration of her employment contract 2 weeks in advance, pay all outstanding wages, and cover costs of the flight and all others necessary for repatriation.

4. Working conditions[76)]

(1) Salary

Employers shall report the monthly salary of their foreign domestic workers on the work permit application. The employer shall pay the foreign domestic worker the

76) Singaporean Ministry of Manpower website, http://www.mom.gov.sg, Foreign domestic worker

monthly salary as reported on the work permit application given to the Ministry of Manpower. The employer shall pay the salary within 7 days of the end of the month. The employer shall pay the foreign domestic worker her salary each month, and the salary period must not exceed one month. The employer shall not force the foreign domestic worker to deposit her money in a savings account.

The employer can transfer the salary directly to the foreign domestic worker's bank account in Singapore. If the salary is paid in cash, the employer must keep a record of the salary and the foreign domestic worker shall sign the record to confirm that payment has been made.

(2) Rest days and well-being

The employer is responsible for the health and well-being of the foreign domestic worker, and shall provide for rest days, proper accommodation, adequate medical care and safe working conditions.

To ensure that the foreign domestic worker gets enough mental and physical rest, the employer shall allow her to have a regular rest day. A paid rest day shall be given once a week, or an additional day's wage shall be paid or a replacement rest day given within the same month.

The employer shall provide the foreign domestic worker with proper accommodation. The accommodation shall be equipped with basic amenities, and the foreign domestic worker shall not sleep in the same room with a male adult or teenager. The employer shall also provide the foreign domestic worker with three meals a day.

(3) Employment contract and safety agreement

Employers are encouraged to sign employment contracts with their foreign domestic workers and are required to sign a safety agreement with the employees. Employment contracts are necessary to avoid disputes.

(4) Prevention of abuse and ill-treatment

Employers will face severe penalties if they are convicted of abusing a foreign domestic worker. The Ministry of Manpower takes allegations of abuse and ill-treatment of a foreign domestic worker seriously, especially if employers commit physical or sexual abuse. If the Ministry suspects that a foreign domestic worker is being abused or ill-treated, the police will investigate. If convicted, employers will face severe penalties under the law. Employers and their spouses will also be permanently banned from employing any other foreign domestic workers.

5. Expenses related to the use of foreign domestic workers[77), 78)]

77) Singaporean government website, E-service, http://www.ecitizen.gov.sg , Employment method for domestic

The reason Singaporeans employ so many foreign domestic workers is due to compatibility between the necessities for life and the costs. Couples who both work outside and have children need help in raising their children. A particular need is when caring for elderly parents at home, someone like a nursing care housekeeper is absolutely essential. There is also significant demand for someone to prepare dinner for the family when the couple comes home exhausted after work. These aspects of two-income households are similar in Korea. However, in Singapore a family with young children can hire a domestic worker for about KRW 500,000 per month, which is a reasonable burden.[79)]

The details of expenses can be described as follows:

(1) Expected costs besides salary

1) Employment agency fee: between SGD 100 and SGD 2,000 (differs by agency)
2) Settling-in program: SGD 75 (if the foreign domestic worker is working in Singapore for the first time)
3) Applying for the Work Permit: SGD 30
4) Work Permit document: SGD 30
5) Employment tax for hiring a foreign domestic worker: SGD 265 per month (When a concession rate applies: SGD 60 per month. For the concession rate to apply, one of the following needs to be true: ① the family has a child or grandchild living with them who is a Singapore citizen and a maximum 16 years of age; ② the family has an elderly family member living with them who is a Singapore citizen and at least 65 years old; ③ the family has a person with disabilities living with them who needs assistance.
6) Security bond: SGD 5,000 (Can be substituted by a bank's security bond or guarantee)
7) Medical insurance: coverage of SGD 15,000
8) Personal accident insurance: coverage of SGD 40,000

Accordingly, expenses to be paid immediately, including employment agency fees and government employment tax will likely be between SGD 500 to SGD 2,600.

(2) Salary levels

There are many factors to consider when determining salary. Experience and relevant training are the main ones. However, a domestic worker's nationality may also play a

---

workers

78) Singaporean Ministry of Manpower website, http://www.mom.gov.sg, Foreign domestic worker

79) Korean per-capita income is USD 28,739, while Singaporean per-capita income is USD 56,319: nearly twice that of Korea.

part. Minimum salaries for Indonesians and Filipinas start at SGD 500 in Singapore, at SGD 450 for Myanmar workers, and SGD 400 for Sri Lankan workers. Recently, the Philippine government is looking to reduce the number of domestic workers entering Singapore, which will cause the salaries to increase accordingly.[80] Employment expenses together with government tax (SGD 265 per month, or SGD 60 at the concession rate) can be expected to equal between SGD 500 to SGD 800. This means foreign domestic workers can be hired for a total cost of between KRW 410,000 and KRW 650,000 per month. This represents expenses for using foreign domestic workers in Singapore equaling only 20-32% of what would need to be paid to Korean domestic workers (an average of KRW 2 million).

Ⅲ. Evaluation of the Use of Foreign Domestic Workers in Singapore

1. Management through Immigration Control

Immigration control in Singapore is well managed through regulated immigration policy. Singapore has taken advantage of the abundant supply of low-wage workers from neighboring countries. Since its introduction, the government has focused on three major categories in the course of managing the Foreign Domestic Servant Scheme.

(1) Continuous management of foreign workers

A foreign domestic worker running away from her place of employment is considered the employer's responsibility, and will result in the employer's security bond of SGD 5,000 (4 million Korean won) being forfeited, which forces the employer to make efforts to ensure his/her foreign domestic worker does not break her employment contract or terms of her entry visa. The government also supervises to ensure that the foreign domestic worker receives a health examination every six months to check whether she has any infectious diseases or has become pregnant. In cases where the employer uses the foreign domestic worker for other duties besides housekeeping work, the employer will certainly be punished. So, the foreign domestic worker is strictly monitored to retain her resident status, and is not allowed to work other jobs, but shall go back to her country upon expiry of her employment contract.

(2) Protections for foreign domestic workers

80) Money Smart blog, http://blog.moneysmart.sg/, How much does it really cost to hire a domestic help in Singapore, July 9, 2015.

The employer shall bear all expenses necessary in hiring the foreign domestic worker. These include air tickets, the settling-in program, medical examinations, medical insurance and personal accident insurance, which shall not be transferred to the foreign domestic worker. The employer shall also provide accommodation and relevant items for daily life. In particular, the government listens to reports of abuse (whether verbal, physical or sexual) against the foreign domestic worker, and strictly punishes employers who engage in abuse.

(3) Employment levy and tax return

The employer shall pay the foreign domestic worker levy of SGD 264 per person every month, which is an employment tax equivalent to KRW 220,000. However, employers living with a child or grandchild of 16 years of age or younger, living with parents aged 65 years or older or with a family member with disabilities, shall pay a concession rate of SGD 60 (KRW 49,000) instead. The government levies a higher employment tax on people outside of these situations, to protect the affordability of the foreign domestic workers system for those who need it.

Besides the employment tax program for foreign domestic workers, Singapore also maintains an incentive tax program. In cases where a married woman continues to work, she will be reimbursed the total employment taxes she paid in return for employing the foreign domestic worker through the year-end income tax adjustment. This serves as an income tax incentive towards encouraging women to continue working, and does not apply to unmarried women or men (whether married or not).[81)]

2. Management through Labor Laws

(1) Salary

Since Singapore labor law does not apply to foreign domestic workers, her salary can remain lower than the minimum wage, while still remaining remarkably higher than what she would earn in her home country. This makes it advantageous to continue the Foreign Domestic Worker Scheme, but the large gap between what they earn and what their Singaporean counterparts can earn can leave the foreign domestic workers with a sense of comparative deprivation.

(2) Working hours and holidays

As there are no restrictions on working hours, the foreign domestic worker can be

81) Singaporean Tax Office, Tax return regarding the Foreign Domestic Worker, https://www.iras.gov.sg

requested to work long hours, and may be subject to exploitation. Days off are required by law to be provided once a week, but these can be substituted with additional pay instead.

(3) Other working conditions

Physical, sexual, and verbal abuse and mistreatment are prohibited. If committed, the employer will be charged with a crime and banned from using foreign domestic workers again.

3. Evaluation

There are two ways to take advantage of the benefits of foreign personnel: one is to use highly-qualified professionals, and the other is to use cheap non-professional personnel to supplement manpower. The foreign domestic workers used in Singapore are to supplement the available non-professional manpower. This program to make the most of the foreign domestic workers positively affects female social activities and guarantees a comfortable home life.[82] Currently, Singaporeans use the foreign domestic workers very commonly, and their numbers make up 4% of the total population, while in Korea, the proportion of domestic workers is less than 1% due to the high costs.[83]

The two key elements for Singapore's successful foreign domestic workers program are its favorable internal/external environment and thorough management. The internal/external environment refers to the lack of sufficient manpower within Singapore and the abundance of that manpower in the neighboring countries. The countries sending domestic workers have supported their nationals going abroad to make money due to the low salaries and high unemployment rates in their countries. Domestic workers can earn several times more in a housekeeping job than working in their countries, and furthermore can directly experience an advanced culture, and so domestic work has been a considerably favorable job. The appropriate labor costs have been well-controlled due to the balance between personnel supply and customer demand. Internally, the Singaporean government has a strict and thorough management system for foreign domestic workers. This system includes employment taxes for each domestic worker, mandatory physical examinations, and strict enforcement of

82) Money Smart blog, 4 Reasons Singaporeans are So Reliant on Their Maid, http://blog.moneysmart.sg, June 14, 2016

83) Asia Economy Daily, Domestic worker and nursing caregiver's working rules to be made---considering the introduction of standard employment contract, September 25, 2014

regulations, which have made it almost impossible for domestic workers to run away from their workplaces and stay in Singapore illegally. These factors have made the Foreign Domestic Worker Scheme possible and effective while remaining secure and manageable.

Ⅳ. Legal Protections for Domestic Workers & Introduction to Korea of Singapore's Foreign Domestic Servant Scheme

1. Legal Protections for Domestic Workers

(1) Global standards

In 2011, the 100th General Assembly of the International Labour Organization (ILO) adopted the Convention Concerning Decent Work for Domestic Workers and a Recommendation. The major content of the Convention includes applicable regulation of domestic workers under labor laws just like other ordinary workers, such as reasonable working hours, one day off a week of 24 consecutive hours, restrictions against payment in kind rather than cash, clear statements of working conditions, and freedom of association.[84] As of May 20, 2014, the Convention has been ratified by 14 ILO member countries, most of whom are supplying domestic workers to other countries. Korea has not yet ratified the Convention, but legal enactment has been proposed by some lawmakers to conform to the standards of the ILO, but no legislative action has been taken.[85]

According to an ILO report on the status of domestic workers around the world, only 10% are protected by the host nation's labor laws that apply to ordinary workers, while 30% are completely excluded from all application of labor laws. This report also points out that about 70% are partly protected by related regulations in the host nation, although these regulations are not labor laws. Of particular note is that the two advanced nations of Korea and Japan exclude domestic workers completely from application of labor law.[86]

(2) Korean domestic workers and application of labor law

1) Reasons why domestic workers are excluded from labor law

Here, 'domestic worker' refers to persons employed for the purpose of assisting with

---

84) Meeyoung Goo, Legal Protection for Domestic Workers, Labor Law No. 50, The Korean Labor Law Association, June 2014, p. 260.

85) Public Hearing on Legalization of Domestic Workers Representatives Choonjin Kim, Jungae Han, Korean National Assembly document, April 30, 2013

86) Kyunghyang Daily report, Korean domestic workers are excluded from limits on working hours and minimum wage, January 9, 2013.

housekeeping duties (cooking, cleaning, nursing, childcare, etc.).[87] We will now look at the reasons why domestic workers are excluded from labor law.

First, according to Article 11 of the Labor Standards Act, This Labor Standards Act shall apply to all businesses or workplaces in which five or more workers are ordinarily employed. This Act, however, shall not apply to any business or workplace which employs only relatives living together, and to workers hired for domestic work. The Labor Standards Act stipulates in this article that domestic workers are excluded from application of labor law.

Second, relations between an employer and a domestic worker are considered private relations that do not fall under governmental authority.[88] The caregiver is usually engaged with a particular patient and provides exclusive nursing care, but if the caregiver works for a care-providing company and receives a wage in return for giving nursing care, the person is considered someone to whom the labor law applies.[89]

Third, a domestic employer is not considered a business or workplace, because he/she does not employ a domestic worker to seek profit or accomplish a business purpose, but simply for convenience.

2) Necessity for protection

Domestic workers, as pointed out in the ILO report, do not receive protection against low salaries, abusively-long working hours, and the loss of rest hours, suffer from mental, physical and sexual abuse, and have restrictions on their freedom of movement. Accordingly, considering the length of working hours while exclusively engaged with a particular family, it is necessary to protect the basic rights such as a minimum level of salary, maximum working hours, and guaranteed off-days.[90]

2. Introduction of the Singaporean Model to Korea

(1) Preparation of relevant laws

Currently, foreign domestic workers cannot legally be employed inside Korea, except for overseas Koreans (H-2 visa holders).[91] The Act on Foreign Workers' Employment, etc. deals with non-professional workers (E-9) and overseas Koreans (H-2) who are fully protected by Korean labor law. However, domestic workers are regarded as a

87) Jongyooul Lim, 「Labor Law」, 14th edition, Park Young Sa, 2016, p. 337.
88) Kaprae Ha, A Study on the Legal Status of Domestic Workers, Labor Law No. 37, The Korean Labor Law Association, March 2011, p. 216.
89) Labor Ministry Guidelines: Labor Standards team - 5557, Oct 10, 2006.
90) Kaprae Ha, 「Labor Law」, 27th edition, Joongang Economy, 2015, p. 98.
91) Hyekyung Lee, A Study on the Employment of Foreign Domestic Workers in Korea, Korean Demography Vol. 27, No. 2 (2004), The Korean Demography Association, p. 146.

special type of workers excluded from direct application of labor law, and so it is necessary to prepare special regulations or guidelines when considering introduction of foreign domestic workers in Korea.

(2) Security bond

In reviewing Singapore's Foreign Domestic Worker Scheme, the most impressive item to be reflected on is the security bond. In Korea, if a foreign worker disappears from the workplace, the employer is not responsible for it, but if this happens in Singapore, the employer's deposited security bond of SGD 5,000 is forfeited in most cases. As this represents a serious financial hit for most employers, they take extra care to ensure their foreign workers do not disappear.

(3) Protection programs for foreign domestic workers

Even though Korea has not yet ratified the ILO's Convention Concerning Decent Work for Domestic Workers, we need to thoroughly train and manage employers who will employ foreign domestic workers to ensure compliance with the measures suggested for foreign domestic workers such as reasonable working hours, provision of a weekly holiday, and written statements of actual working conditions. Just as in Singapore, Korea needs to introduce a systematic management system such as pre-employment and semi-annual medical examinations, secure accommodations, medical insurance, and provision of round-trip air tickets. In particular, it is necessary to create regulations against and remedy procedures for sexual/physical violence by the employer, long working hours, and violations of other human rights, and establish a system to protect foreign domestic workers.[92)]

3. Items to Consider before Introducing Foreign Domestic Workers to Korea

(1) Balancing supply of and demand for domestic workers

Singapore has used foreign domestic workers for the past 40 years, able to keep costs down because Singapore does not use an Employment Permit system to control employment, but a Work Permit system that allows it to maintain balance between supply and demand. In Korea, it is only possible to hire a limited number of foreign domestic workers and they must be overseas Koreans (H-2 visa holders) from China or Russia. As there is more demand than supply, the cost difference between hiring overseas Koreans as domestic workers and hiring native Korean domestic workers is insignificant.[93)] Here, the basic reason to introduce foreign domestic workers in Korea

92) Meeyoung Goo, thesis quoted above, p. 289.

is due to the lower costs.[94] In terms of this basic intent, keeping a balance between supply and demand in employing foreign domestic workers, Korea can also take advantage of the resulting cost-effectiveness over a long period of time just as Singapore has done through its Foreign Domestic Worker Scheme.

In the course of introducing such a foreign domestic worker scheme, it is desirable to take advantage of civilian employment agencies licensed by the government. Through competition between these employment agencies, it would be possible to maintain a sizable manpower pool so that employers can choose the most suitable workers for employment and keep costs down.[95]

(2) Language and accommodation issues

In Singapore where the official language is English, there is no great difficulty in communicating with foreign domestic workers in English. Countries like the Philippines, Myanmar, Indonesia, and Sri Lanka that send foreign domestic workers can communicate in English, and many applicants from those countries have college degrees as well. However, in Korea, as English is hardly used in ordinary homes, there would be communication issues due to language. Foreign domestic workers would need to be able to speak some Korean to maintain basic communication. Therefore, more incentives would be needed to attract those who can speak Korean. On the other hand, there would be a number of Korean families who intend to hire Filipinas who speak English fluently in the interest of teaching their children how to speak English. Highly educated couples, especially, would prefer to hire foreign domestic workers who can speak English well.

Regarding residence, most domestic workers in Singapore stay in the employer's home. This reduces the cost of keeping a domestic worker, and also makes it possible for the employer to have domestic maid service whenever needed. The average Korean home is a 30 pyeong apartment with three rooms, and giving the domestic worker one exclusive room would be best, but if the family is too large for this, the domestic worker can share a room with the employer's young child.

(3) Preparations to prevent illegal status

Along with the increased number of foreigners staying in Korea, which has surpassed 2 million people, or 4% of the entire population, the number of foreigners

---

93) Leesoo Kang, The Current Status and Employment Conditions of Domestic Workers, ?Society and History」Vol. 82 (2009), Korean Sociological Association, p. 236.

94) Hyekyung Lee, thesis quoted above, p. 144.

95) Sunmee Kim, Housekeeping Jobs Filled with Domestic Workers and Related Case Study, Korean Family and Human Resources Management Association Vol. 12, No. 4, November 2008, p. 29.

staying illegally has increased to 200,000. The most important point in employing foreign domestic workers is to keep costs down. Cases where foreign domestic workers run away from their place of employment and move to a better-paying job will render a foreign domestic worker scheme ineffective in this regard. Accordingly, before introducing any foreign domestic worker scheme, prior system measures need to be in place to make it difficult for foreign domestic workers to stay illegally. As explained above, one method is to hold the employer responsible through the threat of losing a significant security bond, but this would not be enough to prevent some foreign domestic workers from leaving to work better paying jobs. A more fundamental solution would be to punish people found to be employing illegal foreigners harshly enough that they would find it impossible to continue their business.[96] In addition to this, foreigners who are working illegally should be treated as law-breakers and punished as severely as possible under the Immigration Control Act.

Ⅴ. Conclusion

People and products cross borders freely in this era of globalization, integrating all nations into one great market. Singaporeans have taken advantage of the supply of cheap foreign domestic workers. Through this, the city state has increased its competitiveness by making the most of its female manpower by keeping child-rearing expenses low while improving quality of life. Koreans also need to take advantage of the supply of foreign domestic workers, as is done in Singapore, towards increasing the low birth rate and assisting highly-trained women to continue their careers while they raise their families.

Singapore introduced its Foreign Domestic Servant Scheme (FDSC) in 1978 to bring in foreign domestic workers. There are three factors behind the FDSC's success.

First, there has been a greater supply of domestic workers from neighboring countries than demand for their services in Singapore.

Second, it has been possible to maintain a secure supply for many years through strict immigration regulations that make it difficult for foreign domestic workers to work illegally.

Third, Singapore's indirect supervisory administration makes efforts to protect the

96) The Immigration Control Act: Article 94 (Penal Provisions): Any person to whom any of the following subparagraphs apply shall be sentenced to imprisonment with or without labor not exceeding 3 years, or to a fine not exceeding 20 million won: A person who has engaged in employment activities without a valid status of stay for employment in violation of Article 18.

human rights of these domestic workers and improve their working conditions.

In order to take advantage of low-cost foreign domestic workers as Singapore has done, action must be taken to ensure three main points for success: ① maintaining the low cost of labor; ② preventing foreign domestic workers from working illegally; and ③ preparing protections for employment of current domestic workers while taking advantage of the lower cost foreign domestic workers.

First, how can we maintain a low cost of labor over a long period of time? If the costs end up being the same as hiring Korean workers, there is no benefit to hiring foreign ones. So, in cases where employers can hire domestic workers all the time without a maximum as is done in Singapore, the cost of the supply can be sustained due to price adjustments inherent in a balanced supply and demand.

Second, how can we prevent foreign domestic workers from working illegally while other migrant workers are earning three times more money? Above all, the employer hiring a foreign domestic worker should be held directly responsible for that worker disappearing by means of forfeiting the employer's security bond. However, the only way to resolve this issue is through strict enforcement of immigration law for both Korean employers illegally hiring migrant workers, and the illegal migrant workers themselves. Company employers who have hired illegal foreign domestic workers should be punished harshly enough that it will be impossible to continue their business. At the same time, when such illegal foreign domestic workers are caught working illegally, they should be deported immediately after suffering legal and financial consequences serious enough to deter others.

Third, how can we protect the employment of the current Korean domestic workers while taking advantage of the low cost of foreign domestic workers? One method is to levy an employment tax from domestic employers who benefit from hiring low-cost foreign domestic workers as occurs in the Singaporean taxation system. This employment tax can be used to support re-employment training for Korean domestic workers and create more suitable jobs for them.

인사관리 앱 개발 (Mobile App)

기본서 Basic Guides	1. 노동법전 2. 노동법 해설 3. 노동 사건 사례	1. Labor Law 2. Labor Law Guide 3. Labor Cases
동영상 (Video)	YouTube GO	Korean and English videos (each 20 categories)
매뉴얼 Manual	1. 구조조정 2. 해고 3. 외국인 고용과 비자 4. 노동조합 5. 임금 6. 근로시간, 휴일, 휴가, 7. 비정규직 근로자 8. 근로계약 9. 산업재해보상보험 10. 직장내 괴롭힘&성희롱 예방 11. 근로감독 준비 12. 취업규칙 13. 고용보험 14. 남녀고용평등 15. 노사협의회 16. 산업안전보건법 17. 국민연금, 국민건강보험	1. Workplace Restructuring 2. Dismissal 3. Foreign Employment and Visa 4. Labor Union 5. Wage 6. Working Hours, Holiday, Leave 7. Irregular Workers 8. Employment Contract 9. Industrial Accident Compensation 10. Workplace Harassment Prevention 11. Labor Inspection Preparation 12. Rules of Employment 13. Employment Insurance 14. Equal Employment Act 15. Labor Management Council 16. Industrial Safety and Health Act 17.National Pension, Health Insurance
Auditing	Self-Assessment for Labor Inspection	근로감독 자가진단 앱 추가 제작
외국인 Foreigner	출입국관리법과 외국인 (기고글, 동영상, 비자36가지)	Immigration Laws and Foreigner Workers (Law, Articles, Video, Visa)
근로계약 Employmt Contract	근로계약 자동작성 (5가지 기본 틀을 가지고 작성) (정규직, 기간직, 시간제)	Making Employment Contracts based on 5 basic templates (Regular, fixed-term, and part-time)
자동계산 Automatic Calculation	1. 임금명세서, 2. 연차휴가, 3. 퇴직금 4. 4대보험, 5. 퇴직소득세 6. 산재보상 (장해보상, 유족보상, 민사상 손해배상)	1. Payslip, 2. Annual Leave, 3. Severance Pay 4. Social Insurance Premiums 5. Retirement Income Tax 6. Industrial accident benefits and civil compensation
Labor Auditing	1. 주요 질문/답변 2. 인사감사	1. FAQ 2. Labor Auditing

- "__" underlined parts are being prepared, and other parts are completed and posted.
- "__" 표시는 준비 중임. 나머지는 완료 되었음.